ABORIGINAL &
TORRES STRAIT ISLANDER
LEGAL SERVICE (QLD SOUTH) LTD

CMC Review of Public Nuisance
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Submissions of the Aboriginal & Torres Strait Islander Legal Services (Qld South) Ltd ("ATSILS (QLD South)") to the CMC Review of Public Nuisance.

We would like to formally thank the CMC for being accorded the opportunity to provide a submission on this very important topic.

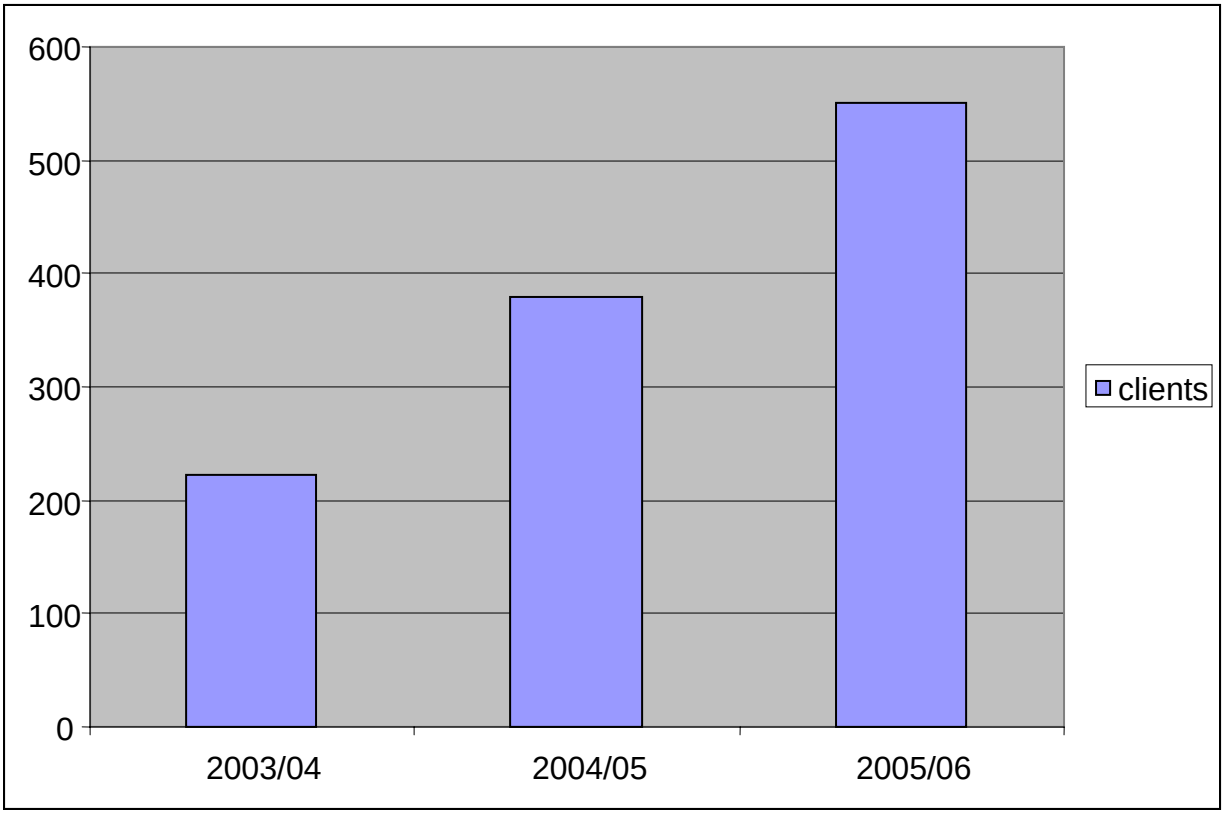
Summary:

- The CMC enquiry is of limited utility if the conclusions (which logic suggests will be reached) result in nil legislative reform.
- Legislative reform in recent years has been contrary to the grand aspirations of the *Aboriginal & Torres Strait Islander Justice Agreement.*
- Law reform should be a collaborative process and involve key stake holders such as ATSILS (QLD South) *before* the event.
- Section 6 *Summary Offences Act* needs to be radically overhauled.
- Since the inception of section 6 we have seen a sharp increase in arrest rates for "street" offences – so much so that the Brisbane Central Magistrate (arrest) Court has had an additional court allocated in recent months in order to accommodate the volume of work.
- Our Organisation, at a cost to the taxpayer, has had to allocate extra resources "at the coal face" to cope with the added demands for legal assistance.

Introduction:

At the risk of being misconstrued as being offensive – it needs to be pointed out that there is little point in the CMC conducting an enquiry, if at the end of the day – nothing flows from the conclusions drawn. For example, not so long ago, the CMC produced a detailed report on the police use of capsicum spray. That report (quite rightly) drew some adverse conclusions in terms of such things as the police use of spray upon individuals who were already restrained and the disturbingly disproportionately high numbers of Indigenous Australians who were sprayed. What action or legislative reform was embarked upon as a result of that report? All we have seen since, is the ever-increasing expansion of police powers (a recent example being the further extension of police move-on powers). Changes, which much like section 6 of the *Summary Offences Act* itself, will see more and more people being hauled before the courts for innocuous activities. Often for actions which were simply a response to the presence of the police in the first place.

The following Table demonstrates the increase in client representations by our office in the Disorderly/Public Nuisance category for the financial years outlined therein:



Our background:

ATSILS (QLD South) provides criminal, civil and family law services to Aboriginal and Torres Strait Islander people throughout the southern half of Queensland. In addition, the Commonwealth Government has designated ATSILS (QLD South) to be the lead Indigenous agency to consider Law and Social Justice Reform for Indigenous Australians throughout the entirety of Queensland (together with State-wide jurisdiction in the area of monitoring Indigenous deaths in custody). ATSILS (QLD South) works at the "coal face" of the criminal justice arena. With many, many years experience of this type of legal practice and combined with being part of the wider Indigenous community, we have a real understanding of the issues at hand. It is by the light of this experience and background, that we put forward what we believe to be both sensible and workable suggestions.

Questions to consider:

1. Behaviour resulting in a charge of public nuisance?

A fairly recent example of one of our clients demonstrates the pitfalls in this area:

The client in question was minding his own business in the Fortitude Valley area. The police own outline of facts indicate that they approached our client (whom they recognised) to simply say "hallo". Our client seemingly took exception to the police attention and allegedly told them "where to go". He was arrested and charged with committing a public nuisance. It was the arrest process itself which arguably created a public nuisance!

In another example, a homeless Indigenous female was charged with committing a public nuisance for pushing over a chair in a café. She was arrested despite explaining to the police that she had done so in order to protect herself from another individual who had attempted to stick a needle in her arm!

So often we see clients arrested and charged in situations where prior to the arrival of the police – no offence was being committed. We should not allow situations where insensitive policing methods can effectively "drum up" business by provoking a response that seemingly justifies affecting an arrest. What would the public make of a doctor who increased his clientele by making his patients sick in the first place?

Public Nuisance legislation should be focused upon addressing activities which in a real sense constitute a breach of the peace. Earlier legislation in applying the test of "*with intent to provoke a breach of the peace*" had two criteria: (a) was there an intention to commit an offence; and (b) was the behaviour such as to result in another person reacting to it?

The earlier position sifted the trivial from substantial complaints. In a similar fashion, we need to quarantine those matters which are trivial and where no harm would come to anyone, from those matters where the behaviour poses a real risk of, for example: significant distress, or harm to someone.

2. What proportion of charges flow from complaints by members of the public?

Our experience suggests that a not insignificant proportion of these offences flow directly from police complainants. Further, it is also very easy to "allege" that an arrest was affected because other members of the public were "clearly disturbed" or "clearly upset" by the behaviour in question. Given the stated rationale behind public space laws - our view is that the police should be required to receive a complaint from a member of the public (other than themselves) before being able to affect an arrest for a public nuisance. If a member of the public is indeed "clearly disturbed" etc – then such a requirement could be easily accommodated by the police.

- Proposal: We strongly believe that legislative reform should require that a complaint be made by a member of the public other than a police officer.
- Proposal: Alternatively, that legislative reform recognises that where the complainant is a police officer – imprisonment is not a sentencing option.

3. Vulnerable groups – disproportionately charged?

The CMC's call for submissions notes that some groups are especially vulnerable to the adverse impact of section 6 *Summary Offences Act* and that these groups include:

1. Homeless people;
2. Indigenous people;
3. Young people; and
4. People suffering from Mental Illness.

Many of our clients fall into these categories – particularly of course, category 2. "Homelessness" can have a particular significance in Indigenous Australian cultures.

Indigenous Homelessness:

Most people are homeless other than by choice. However, many Indigenous Australians occupy public spaces as a life-style preference in accordance with their cultural backgrounds. Sleeping out in the open is part of Aboriginal culture and embraced by many. Musgrave Park for example, is a special place in Aboriginal lore. Many Aboriginal people continue to embrace the interconnection, which their people have had from time immemorial, by gathering and staying in these places of particular cultural significance. Surely they should be allowed to be true to their culture without undue police interference?

Given that many of our clients choose to live in public spaces, it would come as no surprise to learn that they are disproportionately disadvantaged by public space laws which both target those who live in the streets and which are unsympathetic to cultural differences. Of those Aboriginals who are homeless not by choice, census data suggests that they are four times more likely than others to be without a home. And, when Indigenous Australians do have accommodation, it is six times more likely to be overcrowded than in other communities. While home-ownership is 70% for non-Indigenous Australians it is only 32% for Indigenous Australians.

Many of our clients are also homeless as a by-product of mental illness. The statistics suggest that at least 30% of homeless people suffer from mental illness. With the closure of many institutions which specialised in caring for the mentally ill, those suffering with this condition are often forced to live on the streets. While some homeless are dysfunctional or have problems with social mixing because of mental illness, they do not necessarily pose a danger to themselves or others.

***Indigenous Youth*:**

The situation of arrest on a *trifecta* offence is exacerbated for 'Street Youth'. Some youth may have been on the streets for days with only fitful sleep and little food in that time. They are often forced on to the streets as a result of abuse (sexual, physical and emotional). Surely we live in a society that can appreciate that such social justice issues need to be remedied other than in our criminal courts of law?

- Social justice issues should not be the subject of criminal sanction.

4. Adequate provision for defences?

The simple answer to this question is a resounding "no".

In light of the underlying rationale behind the public nuisance legislation:

- We firmly believe that the police should be prohibited from intervention unless the safety of the public is at risk. Innocuous behaviour should not see police interfering in the freedom of the public.

The then Attorney-General, the Hon Rod Welford MP seemingly hit the nail on the head when he stated at a public forum in June 2004:

> *'Well, it is true that laws relating to public order do disproportionately affect people who are homeless and indigenous people. That is true. I think one of the things that has come through in all the discussion… is the need for us to think again about the front end issues of how law enforcement agencies interact with people who are homeless, disadvantaged or indigenous. I think there are real issues about how police operate in some circumstances. To be fair, in schools and in other places there are some police who are very good. There are some police who in their liaison with people who are alienated from mainstream society in some way deal with the predicament of people in a sensitive and responsible way. It's true also that there is much more that can be done to better educate and train our police for these interactions, so that the laws relating to the protection of public order, **what it is really about - peace and security for people using public space – is applied in a way that's intended for the real purpose, only to protect people whose security is threatened**.'* (Emphasis added).

- **We would also urge that a statutory defence of "reasonable excuse" be inserted**. For example, a person should not be subject to arrest for vomiting in public – notwithstanding that such may be "distasteful" to some.

Further, in accordance with our previously stated position as part of the *Rights in Public Spaces* coalition:

- We would also suggest that consideration be given to **the inclusion of a "vulnerable person's" clause** – making it clear that arrest should very much be an option of last resort when dealing with a vulnerable person (eg cautioned or moved-on or referred to a social welfare agency rather than arrested).

5. Impact of the provision upon the safety or community use of public spaces?

Clearly the provision has caused significant disadvantage to the more vulnerable members of our society's use of public spaces.

- Significantly, the provision has not resulted in a safer society – the police have always been able to justify an arrest in those situations where the public's safety was truly at risk. What we have seen is a sharp increase in people being arrested for trivial matters.

6. Overlapping of offences?

Often we see defendants being charged with a public nuisance offence notwithstanding that the alleged facts would have justified a lesser charge of either **public drunkenness** (section 10) or non-aggravated **willful exposure** (section 9) – neither of which carries with it a potential sentence of imprisonment. This selectivity can also be crucial should a defendant appear before the court on an alleged public nuisance offence that puts him or her in breach of a suspended sentence of imprisonment.

- The author can recall a fairly recent occasion where an Indigenous client was fined in relation to a public nuisance offence, but then sentenced to imprisonment because that offence was committed in breach of a suspended sentence!

7. Alternative to other offences?

See reference to Drunk in a Public Place and Willful Exposure in point 6 above.

8. Accompanied by other charges?

Yes. Typically offences relating to the interaction with the police themselves. For example, **obstruct police** and **assault police**. Accordingly, we will commonly see scenarios where the police involve themselves with members of the public who are not causing a threat to the security of others – yet are arrested for "public nuisance". The inevitable angst and resentment that flows as a result thereof gives rise to obstruct/assault charges et,. and in the process putting both the police and the member of the public being arrested, at risk of injury.

9. Location of offending?

In terms of Indigenous Australian "offenders" – so often we will see charges arising from activities which take place at various traditional meeting places (eg Musgrave Park) and other places where Aboriginal and Torres Strait Islander people tend to congregate – such as the Valley Mall. Activities, which if carried out in the privacy of their own homes (eg consuming alcohol), if they owned such, would not give rise to an

offence. When the park *is* your home – problems follow. So often the disadvantaged are criminlised for being poor.

10. The exercise of police discretion?

One clear problem is the way in which the police exercise their discretion in terms of "to charge or not to charge". For example, if a non-Indigenous lawyer in a nice suit staggers home from the Magistrate Court Christmas function and passes the police en route – he or she will probably be greeted with a smile rather than be arrested for public drunkenness. What tends to happen is that vulnerable people, such as the young, homeless, mentally impaired and Indigenous Australians are far more likely to be targeted than older, non-Indigenous, middle-class individuals, even if these other individuals engage in the same kinds of behaviour. Thus, wide discretionary powers provided to police may inadvertently become a tool for the oppression of marginalised people.

- Enhanced police training is not the answer. If the police are required to enforce laws which by their very nature will inevitably target the most marginalised members of our society – then it is the laws which need reforming. To do otherwise is to fly in the face of reality and unfairly place the police in an invidious position.

It is also unfair on the police force to burden them with the lot of enforcing legislation which is clearly inappropriate to numerous instances.

- The Police are not social workers, nor psychologists, nor taxidrivers.
- Police are the target for criticism when an arrested person self-harms. However, rarely reported are the frustrations with 'the system' that the police routinely have in the case of 'people-at-risk'.
- There is a need for support of the police by coordination of infrastructure and services.

11. Most common police response?

Due to the fact that such behaviour is often related to the consumption of alcohol – the police are generally reluctant to issue a Notice to Appear – instead affecting an arrest and taking people into custody. This also has adverse ramifications in terms of potential imprisonment for any subsequent Breach of a Bail undertaking. Sadly, experience would suggest that good old-fashioned policing techniques such as a verbal "on your bike" cautions – are very much the exception rather than the rule. For clients who operate on "Murri Time", punctuality in attending courthouses can be problematical in the extreme.

Concluding Remarks:

Is the perception of Public Nuisance offences misconceived?

For example, Life can have many irritations:

- What is more annoying: someone, whom you probably will never see again and who asks for a "bus fare" or an overbearing employer whom you see day-in-day-out?
- The person sleeping on the public bench is often non-threatening and considerate enough to leave room for someone to sit down. But, we have all experienced motor vehicle drivers are inconsiderate to others and instead of 'giving room' can be very intimidating. Yet, it seems perverse that while the consideration of the bencher is punished, the aggressive driver is not – we just put up with it.

We believe that the enormous cost to the public purse of criminalising so-called Public Nuisances are not justified where:

- There is no real risk of harm to anyone, and
- There is an absence of a level of harassment which is intrusive and goes beyond convenience or 'sightliness'.

Tourism and the 'sanitised' environment

City planners have found that 'sanitised' urban environments are boring places and people simply do not want to live in such places.

Queenslander's traditionally pride themselves on their relaxed outlook on life. Legislation should be in tune with the mood of the people. When one looks at the bronze figures of bygone colourful people who have been enshrined in King George Square, one cannot but consider the irony that their behaviour nowadays in the spot where their statutes now stand, could result in their being arrested for a Public Nuisance offence.

Tolerance

We all need to be tolerant of our fellow citizens and distinguish between harmless situations and ones where intervention is needed. This is particularly so in the case of Youth and where Indigenous Australians are following their tradition or culture – bearing in mind that "culture" evolves with time and experiences.

Many people (Indigenous and non-Indigenous alike) are arrested, though they are not causing any distress to other members of the public. It seems often that people who are not neatly dressed or a bit loud will attract the attention of Police on the beat. And, it may be as a result of discourteous comments or intrusive questioning by the police, that a member of the public reacts and is arrested.

Once again we thank the CMC for this opportunity to provide feedback. We hope and trust that in due course, those in the corridors of power heed the CMC's recommendations (whatever they might be). We also acknowledge that the police have a difficult job to do – but would respectfully suggest that legislation of this ilk makes their job that much more difficult. We also take this opportunity to acknowledge the invaluable contribution made to the compilation of this report by Mr William (Bill) Neill – our Law and Justice Reform lawyer.

Please do not hesitate to contact us should any additional information or feedback be required.

Yours faithfully,

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